JD–23–15
Crown Point, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NEISES CONSTRUCTION CORP.

and

INDIANA/KENTUCKY/OHIO
REGIONAL COUNCIL OF CARPENTERS

Cases 13–CA–135991
13–CA–139977
13–RC–135485

Renee D. McKinney, Esq. for the General Counsel.
Arthur C. Johnson, II, Esq..(Johnson, Stracci & Ivancevich, LLP) Merrillville, Indiana, for the Respondent.
Paul T. Berkowitz and Suzanne C. Dyer, Esqs., (Paul Berkowitz & Associates, Ltd.,) Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Chicago, Illinois on February 9-11, 2015. The Indiana/Kentucky/Ohio Regional Council of Carpenters filed the charges giving rise to this case on September 3, and October 31, 2014. The General Counsel issued the consolidated complaint in this matter on December 30, 2014.

The two unfair labor practices charges were consolidated with the representation case arising from an NLRB election at Respondent's facility on October 3, 2014. In that election 5 votes were cast in favor of the Union (aka Charging Party/Petitioner), 3 were cast against it, and 11 ballots were challenged (9 by the Union; 1 by the Respondent Employer and 1 by the Board Agent). Thus, the case before me involves the 11 ballot challenges and the Charging Party Union's (aka the Petitioner's) objections to conduct affecting the results of the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Employer and Charging Party (Petitioner) Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Neises Construction Corp. does concrete work in the construction of residential houses. It operates from Crown Point, Indiana, where it annually purchases and receives goods, supplies and materials valued in excess of $50,000 from companies which received those goods, materials and supplies directly from locations outside of the State of Indiana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Indiana/Kentucky/Ohio Regional Council of Carpenters made an effort to organize Respondent's employees in 2013. It renewed those efforts in 2014 and obtained authorization cards from a number of Respondent's employees.

In July 2013, union representative James Slagle visited one of Respondent's jobsites. He talked to the crew leader/foreman James Andrisko and employees Dominic Valenta and Robert "Doug" Carpenter. On Monday, August 25 or Tuesday, August 26, two union representatives, Slagle and Scott Cooley, visited Respondent's offices and asked co-owner Brian Neises to voluntarily recognize the Union. Neises declined and the Union filed a petition to represent a unit of Respondent's employees on August 26. The Union's attorney emailed Respondent a copy of its representation petition on August 26.

The termination of Dominic Valenta

Dominic Valenta worked for Respondent from 2011 until August 29, 2014, with the exception of a 3 month period in 2013 when he left Respondent for another job. During that time he worked almost exclusively on Respondent's wall and footing crews. He rarely worked on the concrete finishing (flatwork) crew. The footing crew constructs the concrete foundation for residential houses. The wall crew erects the basement wall of the house on the footing. Respondent's flatwork or finishing crew pours and finishes the concrete slab for the house's basement. The flatwork crew also does the concrete work for driveways, garages and porch steps, among other things.[1]

During July and August, Valenta spoke with union representatives in the presence of the wall crew leader James Andrisko.[2] He encouraged other employees to support the Union, including Larry Mills, the footing crew leader. Valenta gave union authorization cards to a

[1] The concrete footing distributes the load of the basement wall so that the wall does not cut into the soil the way a knife cuts through a stick of butter.

[2] Superintendent Ron Schaafsma, who I find to be a statutory supervisor, also observed employees talking to union representatives in August 2014, Tr. 408-09. It is unclear whether Valenta was one of those employees.

number of employees, including Mills. While other employees returned signed authorization cards to Valenta, Mills did not do so.

In 2014, Valenta missed work on a number of days and arrived after the 6:50 clock-in time on many others. General Superintendent Ron Schaafsma issued Valenta a written warning for neither showing up to work nor calling-in on June 9, 2014. Schaafsma warned Valenta that he could be suspended for any more no-call, no-shows. Respondent has never had any formal, informal, written or verbal policy regarding attendance or tardiness. Moreover, it had never terminated any employee for poor attendance. I do not credit any of the testimony that Respondent terminated Lino Rios for poor attendance in May 2014. Instead, I credit the testimony of Superintendent Ron Schaafsma that Rios, "quit showing up," Tr. 423.

On Friday, August 22, 2014, Schaafsma told Valenta, Everett Ballou and Mitchell Weidinger that he did not have any work for them for Monday, August 25 and Tuesday, August 26. On Sunday, August 24, Brian Neises called Weidinger and told him to come to work on Monday and Tuesday. On those days Weidinger did concrete finishing work. This was different than his normal tasks which were working on the construction of foundation footings and erection of basement walls.[3]

Valenta worked full days Wednesday, Thursday and Friday, August 27, 28 and 29. On Friday, August 29, 3 days after Respondent became aware that the Union had filed a representation petition, Larry Mills sent Valenta to Brian Neises' office. Neises informed Valenta that he was terminating his employment. Valenta asked Neises for a reason. Neises told Valenta that the reason for his termination was his attendance. He also told Valenta that work was slow and that he had to fire somebody. In late July 2014, Neises had hired two new employees for the flatwork crew, Jose Reyes and Jose Rodriguez. These two employees continue to work for Neises except for a short period of lay-off in December 2014, G.C. Exh. 3.

On August 29, Brian Neises prepared a notice of reprimand for Valenta, G.C. Exh. 11, which he never showed to Valenta. In that notice, Neises stated that Ron Schaafsma gave Valenta two days off on August 25 and 26 for poor attendance and that Schaafsma told Valenta that Respondent would not tolerate this. I find that the statements in this reprimand are false. Not only did Schaafsma fail to corroborate these statements, but I credit Valenta's testimony that he was told not to come to work on August 25 and 26 on the preceding Friday.[4]

In addition to uncontradicted testimony of Valenta and Mitchell Weidinger on this issue, Respondent's time cards show that three members of the footing and wall crews, Valenta, Everett Ballou and Benny Leviner, did not work on these days due to lack of work, G.C. Exh. 3, Bates stamp pages 4, 27 and 49. In addition, Ballou's time card, G.C. Exh. 16(d) shows that he was told to stay home on August 25 and 26. Finally, Valenta's time card, G.C. 16(f) is inconsistent with Respondent's assertion that his absence from work on these days was

[3] Weidinger's testimony on this issue was not contradicted by either Schaafsma or Brian Neises.

[4] Wall foreman James Andrisko could not remember if Valenta was at work on August 25 and 26 or whether he tried to get in contact with him on those dates, Tr. 374-75. I find that he did not do so. Footing crew foreman, Larry Mills, who is still employed by Respondent, did not testify in this proceeding.

unexcused. The "U" entered on Valenta's time sheet for August 25 and 26, G.C. 3, p. 49, indicating an unexcused absence is a post-hoc and false justification for Valenta's termination, Tr. 578-79, G.C. Exhs. 16(f), 3 p. 49. There is no credible explanation for Valenta's termination, given its proximity to Respondent's knowledge of the representation petition, other than anti-union animus.

If I were to assume that Respondent had a non-discriminatory reason for laying off an employee on August 29, it has made no showing that it made a non-discriminatory choice of Valenta for lay-off. On the other hand, if Valenta was discharged for poor attendance, the record establishes that he was treated disparately compared to David Chavez, whose poor attendance record was very similar to Valenta's.

Analysis

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983) ; *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and anti-union animus are often established by indirect or circumstantial evidence.

In order to make a sufficient initial showing of discrimination, the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action.

Dominic Valenta engaged in protected union activity by supporting the Union, talking to union representatives, distributing union authorization cards and encouraging other employees to support the Union. As to employer knowledge, the Board has consistently held that direct evidence is not required. The Board may infer knowledge from such circumstantial evidence as the employer's knowledge of general union activity, its demonstrated union animus, the timing of the discharge and the pretextual reasons for the discharge asserted by the employer, *Lucky Cab Co.,* 360 NLRB No. 43 slip. opinion at 5 (2014).

In the instant case, it is clear that Brian Neises was aware of union organizing as of August 26. The timing of Valenta's discharge 3 days later, in the absence of any other credible reason for the timing of his termination, leads me to conclude that Neises knew or suspected Valenta of union activity, bore animus towards him as a result and discharged him for this reason. This conclusion is also based on the pretextual nature of the reasons given for Valenta's discharge and the falsification of his time sheet indicating that his absence from work on August 25 and 26 was unexcused. Moreover, my conclusion that the non-discriminatory reason asserted for Valenta' discharge was pretextual defeats Respondent's attempt to meet its rebuttal burden, *Id.* at slip opinion page 6.

Additionally, should the counting of challenged ballots result in the Union losing the representation election, the Section 8(a)(3) discharge of Valenta warrants setting aside the results of the October 3, 2014 election, *Dal-Tex Optical Co.,* 137 NLRB 1782 (1962).

Other alleged unfair labor practices

Complaint paragraph V (a) & (b): Union Objection # 2

The General Counsel alleges that Respondent, by Brian Neises, threatened employees in about September 2014 that his company would be unable to compete and would close if it became a union shop. The General Counsel also alleges that Neises threatened employees that Respondent would lose its customers and would have to lay-off employees if Respondent became a union shop.

The evidence relevant to these allegations is Benny Leviner's uncontradicted, and therefore credited, testimony at Tr. 133-37. A few days prior to the Friday, October 3, 2014 election, Brian Neises asked Leviner, an open union supporter, why he wanted the Union. Neises said Leviner was paid well, hadn't worked at Respondent very long and had a lot to lose. Neises told Leviner it would crush his company if the employees selected the Union. Further, he told Leviner that he did not want to do commercial work and that he could not afford to pay union wages.

There is no evidence that Brian Neises or any other supervisor or agent of Respondent specifically told employees that he would close his company or lay-off employees if the Union won the election.

Analysis

I find it unnecessary to determine whether Neises' comments violated Section 8(a)(1) or provided a basis to set aside the election if the Union does not prevail upon a final counting of the ballots. Respondent has committed other significant violations of Act, which warrant setting aside the election if the Union loses. There is no need to address this complaint item as finding a violation and objectionable conduct would not result in any additional remedy.

Complaint paragraph V(c)

The General Counsel alleges that in about September 2014, Respondent posted a notice at its facility more strictly enforcing a requirement for employees to obtain Commercial Driver's Licenses (CDL). In September 2014, Respondent posted a sign in the area in which employees put on their boots and work gear in the morning. That sign read as follows:

THIS JOB REQUIRES A CDL LICENSE

EVERYONE WAS INSTRUCTED WHEN YOUWERE HIRED—

AND MANY TIMES SINCE THAT

YOU WOULD HAVE TO GET A CDL LICENSE

WE HAVE SEVERAL TRUCKS THAT CAN

BE DRIVEN WITH A CHAUFFEURS LICENSE WHILE

YOU ARE GETTING YOUR CDL. IT ISYOUR JOB TO GET THE

PROPER LICENSE TO WORK HERE.

IF TRUCK IS LESS THAN 26001 lbs YOU DO NOT NEED A CDL.

For at least several years prior to 2014, Respondent had posted notices in the same area that stated:

ALL EMPLOYEES MUST BE ABLE TO DRIVE OUR TRUCKS

Valid License – Chauffeurs-CDL-must be working on getting class "A" CDL

It also had posted a sign stating the Respondent would pay 99% of an employee's insurance if the employee had a Class A CDL

Respondent never enforced the requirement that employees either obtain a class A CDL or be working towards getting one. It routinely hired employees who had neither a CDL nor Chauffeur's License. At least on some occasions, employees drove Respondent's trucks without the proper license. Respondent offered no explanation for posting its notice regarding CDLs shortly after the filing of the representation petition. Thus, I infer the posting was result of employees' union activities and therefore a violation of Section 8(a)(1), *La Reina, Inc.,* 279 NLRB 791 fn. 2 (1986); *Schrock Cabinet Co.,* 339 NLRB 182, 183-84 (2003).

The posting of the notice during the critical period between the filing of the representation petition and the October 3, 2014 election is also a sufficient basis for setting aside the results of the election and directing that a second election be conducted—if the Union does not prevail in the final ballot count from the first election, *Miller Industries Towing Equipment, Inc.,* 342 NLRB 1074, 1084 (2004).

Complaint paragraphs VI (a), (c) and (d) as amended at trial

The General Counsel alleges in complaint paragraph VI (a) that beginning on August 29, 2014, Respondent more strictly enforced its attendance policy. In VI (b) he alleges that Respondent violated the Act in terminating Dominic Valenta, in VI (c) he alleges that Respondent violated the Act in issuing a reprimand to Robert Carpenter on September 9, 2014, and in paragraph (d) in issuing a reprimand to Michael Keilman on the same day, G.C. Exhs. 8 & 9.

I dismiss paragraph VI(a) because there is no evidence that Respondent had an attendance policy as of August 29. However, it occasionally disciplined employees for

attendance issues on an ad hoc basis. As to VI (b) I have already determined that Respondent violated Section 8(a)(3) and (1) of the Act in terminating Dominic Valenta. However, as discussed in this decision, Respondent's reliance on Valenta's attendance record was a pretext.

Respondent issued notices of employee reprimand to Robert Carpenter and Mike Keilman on September 9, 2014, G.C. Exhs. 8 & 9. In both notices, it warned the employees that continued poor attendance would result in their termination. There is no evidence that Respondent had ever threatened an employee with termination for poor attendance prior to September 9. As stated above, I find that this threat shortly after the filing of the representation petition, without an alternative explanation, is related to employees' union activities. It is thus a violation of Section 8(a)(1) and objectionable conduct warranting setting aside the results of the October 3, 2014 election—if the Union loses.

Union Objection #1

The Union alleges that the first paragraph of Union Exhibit 1, which was distributed to employees with their time cards about a week before the election is objectionable. The flyer reads as follows:

WHERE DOES COLLECTIVE BARGAINING BEGIN?

> Bargaining logically begins at the beginning, or as another hand-out stated, bargaining starts from scratch. That means that both the union and the company start with nothing and negotiate from there. When a union wins an election, it only gains the right to negotiate with the company for pay, working conditions, and benefits - NOTHING ELSE.
>
> The National Labor Relations Act specifically states that the company and the union need not give into the demands of' the other, rather, they only must bargain in good faith. Some things may stay the same, some things may improve, and some things may regress or be completely eliminated.
>
> Have you asked the Carpenters what employee benefits they may be willing to trade in order to obtain a union check-off clause, or their union dues clause?
>
> > The Union may have stated that it will get you Journeyman's' wages, but as you can see, the bargaining process starts from scratch. The Union cannot guarantee you anything, including Journeyman's' wages.
> >
> > Remember, collective bargaining is really negotiations about the interests of three parties: the company, the union, and the employees. But only the company and the union are at the bargaining table. Under the law, the company bargains what's in its best interests; the union bargains what's in its best interests; where does that leave you?

The Board has long held that, depending on the context, an employer engages in objectionable conduct warranting the setting aside of an election when the employer tells employees that it could discontinue existing benefits and that it intended to start negotiating "from scratch" if employees chose union representation, *Rein Company,* 111 NLRB 537, 538 (1955); *Federated Logistics & Operations,* 340 NLRB 255, 255-56 (2003).

I find that Respondent's hand-out is objectionable. First of all, the hand-out suggests that unit employees' current wages and benefits will be completely irrelevant in bargaining with the Union. To the contrary, the employer may make changes to existing benefits only as the result of a collective bargaining agreement or reaching an impasse in good faith bargaining. In suggesting that the Union must trade in existing benefits in order to obtain additional benefits, Respondent was strongly suggesting to employees that choosing union representation would be futile and was a threat that employees would likely lose their existing benefits if the Union won the election, *Plastronics, Inc.* 233 NLRB 155, 155-56 (1977).

The Ballot Challenges

On September 5, 2014, Neises Construction and the Union entered into a stipulated election agreement. The bargaining unit was described in the agreement as follows:

> All full-time and part-time wall and footer carpenters employed by the Employer working out of its facility located at 1640 East North Street, Crown Point Indiana.
>
> Excluded: All other employees, all employees who are currently represented by other labor organizations,[5] managerial employees, professional employees, confidential employees, clerical employees, supervisors, and guards as defined by the Act.

The agreement further provides that eligible voters were those employed during the payroll period ending Saturday, August 30, 2014, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.[6]

Amongst the categories of employees ineligible to vote were employees discharged for cause after the designated payroll period for eligibility.

[5] Respondent's drivers are represented by a Teamster local, its equipment operators are represented by the Operating Engineers Union.

[6] Respondent's payroll periods were for one week, ending on a Sunday, G.C. Exh. 3, Resp. Exh. 2. Thus the payroll period covered by the stipulated election agreement ran from Monday, August 24, to Sunday, August 30, 2014.

Generally applicable principles

With respect to a ballot challenge, the burden of proof rests on the party seeking to exclude a challenged individual from voting, *Sweetener Supply Corp.,* 349 NLRB 1122 (2007).

To determine whether a challenged voter is included in a stipulated bargaining unit, the Board must first determine whether the stipulation is ambiguous. If not, the Board simply enforces the agreement. If the agreement is ambiguous the Board seeks to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent cannot be determined, the Board determines the bargaining unit by employing its normal community-of-interest test, *Caesar's Tahoe,* 337 NLRB 1096 (2002).

In order to determine whether a stipulation's intent is ambiguous or clear, the Board will compare the express descriptive language of the stipulation with the bona fide titles or job descriptions of the affected employee. If the employee's title fits the descriptive language, the Board will find a clear expression of intent and include the employee in the unit. If the employee's title does not fit the descriptive language, it will also find a clear expression of intent and exclude the employees from the unit. The Board bases this approach on the expectation that the parties are knowledgeable as to the employees' job titles and intend their descriptions in the stipulation to apply to those job titles, *Viacom Cablevision,* 268 NLRB 633 (1984).

The 11 Challenged Ballots

Dominic Valenta

Dominic Valenta worked for Respondent during the pay period ending August 30, 2014. Moreover, he would, so far as this record shows, have continued working for Respondent but for Respondent's discrimination against him. Thus, I overrule Respondent's challenge to his ballot. It must be opened and counted, *Ra-Rich Manufacturing Corp.,* 120 NLRB 1444, 1446-47 (1958).

Matthew Wegman

Matthew Wegman, the son of Brian Wegman, one of Respondent's crew leaders, worked for Respondent on the footing and walls crew from June 19, 2004 until August 16, 2014, R. Exh. 2, Tr. 549.[7] He left Respondent's employment to attend college at Valparaiso University. Thus, Matthew Wegman was not employed by Respondent during the payroll period ending on August 30.

It is well settled that, in order to be eligible to vote, an individual must be employed and working on the established eligibility date, unless absent for one of the reason set out in the Direction of Election, *Ra-Rich Manufacturing Corp*, *supra, Roy*

[7] He also worked slightly less than 50 hours for Respondent in the summer of 2013.

Lotspeich Publishing Co, 204 NLRB 517 (1973). The same principle applies when a stipulated election agreement sets forth the reasons that an individual did not work on the eligibility date. Since Matthew Wegman did not work, was not ill, on vacation, or on a temporary lay-off, I sustain the Union's challenge to Matthew Wegman's ballot. While Respondent argues that Matthew Wegman plans to return to work for it in the summer of 2015, there is no credible evidence to support this assertion.

Ron Schaafsma

The Union challenged Ron Schaafsma's ballot on the grounds that he is and was at all relevant time a statutory supervisor. Section 2(11) of the Act, defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." An individual who is a "supervisor" pursuant to Section 2(11) is excluded from the definition of "employee" in Section 2(3) of the Act and therefore does not have the rights accorded to employees by Section 7 of the Act.

A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in section 2(11) establishes that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor, *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006).

This record establishes that Ron Schaafsma is a statutory supervisor. I find that he has the authority to hire new employees and/or to effectively recommend such action. I find further that Schaafsma exercises independent judgment in doing so. I do not credit Schaafsma's testimony regarding the limits of his authority. It is clear that several employees were hired after being interviewed by Schaafsma and no other management official. These include Benny Leviner and Dominic Valenta. Therefore, Schaafsma has, at least, the authority to effectively recommend the hiring of employees. This authority makes Schaafsma a statutory supervisor in the absence of any other considerations, *Donaldson Bros., Ready Mix, Inc.,* 341 NLRB 958, 962-63(2004).

I also do not credit Schaafsma's testimony of the limitations on his authority to assign and direct employees. Schaafsma has sufficient non-routine authority to assign and direct employees that I conclude that he is a statutory supervisory on this basis as well as his authority to hire. Unlike the crew leaders, Schaafsma moves from job to job

during each workday and shifts employees from one job to another.[8] He also decides, or effectively recommends the composition of each crew, and exercises independent judgment in doing so. I sustain the challenge to Schaafsma's ballot; it should not be opened nor counted.

Benny Leviner

According to the Regional Director's report, Respondent challenged the ballot Benny Leviner on the grounds that he had worked an insufficient number of days or hours to be eligible to vote. In this regard, Respondent relies on the formula in *Daniel Construction Co, Inc,* 133 NLRB 264 (1961). However, that formula is not applicable to employees, including newly hired employees, who are actually working in the bargaining unit during the payroll period of eligibility, *CWM, Inc.* 306 NLRB 495 (1992). Such employees are eligible to vote. The record shows that Leviner worked for Respondent on the footing and wall crews from late July to October 16, 2014. The challenge is overruled and Leviner's ballot should be opened and counted.

Benjamin Lewis, Brian Wegman, David Chavez, Franky Pineda, Junior Perez and Robert Rapka[9]

One of the principal issues in this case is whether the votes of Respondent's employees who were usually assigned to be the flatwork (concrete finishing) crew should be counted. If the designation of the employees' timesheets are "job titles" within the meaning of *Viacom Cablevision, supra,* then Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka are not "wall and footer" carpenters within the meaning of the parties' stipulation. Brian Wegman is a "wall and footer" carpenter because that is how he is designated on the time sheets. The fact that the time cards of the flatwork crews were segregated from those of the wall and footer crew lends credence to the proposition that these designations are job titles.

The fact that Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka are designated as flatwork employees also cuts in favor of upholding the Union's challenge to their ballots. When a stipulation agreement excludes "all other employees" as does this one, it will be read to exclude from the unit any employee whose classification does not match the stipulated bargaining unit description, *Bell Convalescent Hospital,* 337 NLRB 191 (2001). The Union argues that if the flatwork crew employees are included in the unit, then the phrase "all other employees" in the stipulation has no meaning.

[8] At Tr. 400, Schaafsma testified that he *usually* talks to Brian Neises in the morning about moving an employee from one crew to another. His answer suggests that there are times he makes such a decision without consulting with Brian Neises. Moreover, if an individual has authority to assign employees (in other than a routine or clerical capacity) that individual is a supervisor even if he or she does not exercise that authority, *Arlington Masonry Supply, Inc.,* 339 NLRB 817, 818 (2003).

[9] The Union has withdrawn its challenge to the ballot of Derrick Mann. Therefore, Mann's ballot should be opened and counted.

I find that Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka are excluded from the bargaining unit regardless of whether the description of flatwork employees is a formal job title or not. In excluding 3 temporary employees from a unit in *National Public Radio,* 328 NLRB 75 and fn. 2 (1999) the Board relied upon employer action forms, that appear to be something less than a formal job title. In footnote 2 the Board stated that in determining the definition of job classifications sought to be included in a stipulated unit, it may rely on the employer's regular use of the classifications in a manner known to its employees. In this case, Respondent clearly distinguished between "wall and footer" employees and flatwork employees, e.g. Tr. 494.

Indeed, the record establishes that Respondent distinguished between "wall and footer" employees and flatwork employees when selecting employees for lay-off and imposing discipline, e.g., Tr. 56-57. Thus, I find that flatwork employees are the "all other employees" excluded from the bargaining unit by the parties' stipulation. Therefore, I uphold the Union's challenge to the ballots of the Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka. Their ballots should not be opened nor counted.

Respondent contends that these employees' votes should be opened and counted pursuant to the community of interest test. I reject this contention. However, in the event higher authority disagrees with my conclusions. I will address the community of interest standard if applied to this case.

In determining whether a group of employees possesses a separate community of interest, the Board examines such factors as the degree of functional integration between employees, common supervision, employee skills and job functions, contact and interchange among employees, fringe benefits, bargaining history, and similarities in wages, hours, benefits, and other terms and conditions of employment. *Home Depot USA, Inc.,* 331 NLRB 1289 (2000); *Esco Corp.* 298 NLRB 837 (1990).

Neises argues that all of the challenged flatwork employees regularly did the same kind of work that employees on the footing and wall crew performed and often worked together with members of the wall and footing crew. The Union contends that there was very little interaction between the flatwork employees and the wall and footing crew employees. Moreover, the Union contends that the wall and footing work performed by the flatwork crew employees was not substantially similar to that performed by the wall and footing crew employees.

Although the record is not crystal clear on this point, Respondent's brief at pages 8-9 suggests there is a distinction between the type of footing that supports the foundation of a new house and a footing that supports other structures (garages, mailboxes, etc.) and a difference between a wall that constitutes the foundation and other types of walls (for stoops, risers, retaining walls, etc.). The wall and footing crews normally worked on the walls that constituted the house's foundation and the footings that supported these walls. The flatwork employees did not normally do this work. Indeed, when Respondent's

witnesses testified as to the types of footings flatwork employees worked on, they omitted footings for new house foundations.

There is a great disparity in the testimony on the extent of interaction between the flatwork employees on the one hand and the wall and footing employees on the other. Respondent's witnesses, who are mainly flatwork employees, testified without being served with a subpoena. All of them testified to regular interaction with the wall and footing employees. I do not credit any of their testimony on this issue.[10]

The Union's witnesses, on the other hand, testified that there was very little interaction between the flatwork employees and the wall and footing employees. Two of these witnesses Dominic Valenta and Benny Leviner, had been terminated by Respondent. A third, Mitchell Weidinger, either quit or was terminated. I do not credit the testimony of any of these three witnesses on this issue.

The Union's fourth witness, Mike Benko, is still employed by Respondent. He was laid off on January 5, 2015 for the second time in 23 years of employment with Respondent and was still on lay-off during the February 9-11, 2015 hearing.

I find Benko to be the most credible witness with regard to the interaction between the flatwork employees and the wall and footing employees. The Board has recognized that the testimony of current employees, that is adverse to their employer, is particularly reliable in that it is adverse to their pecuniary interest, a risk not lightly undertaken, *Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978); *Flexsteel Industries,* 316 NLRB 745 (1995). Given the likelihood that Benko would like to be recalled from lay-off as soon as possible, I deem it highly unlikely that he would testify untruthfully or exaggerate. I therefore credit his testimony in full and credit it over any testimony to the contrary.

The time cards for the flatwork crew and the wall and footing crews were separated at Respondent's facility. The crews used some of the same tools, but some of their tools differed. Benko testified to the interchangeability of flatwork and wall/footing employees during the period January 1, 2014 through August 29, 2014. Benko himself worked exclusively on the wall/footer crew except for 2 weeks in the January-March 2014 time frame when he performed labor tasks for the flatwork crew.

During this period he never saw Benjamin Lewis do wall and/or footer work. I discredit Lewis' testimony to the contrary and indeed find his testimony not credible.

David Chavez helped the wall crew for about a period of 2 weeks during the January-August timeframe.

[10] I also do not credit the testimony of wall crew foreman James Andrisko as to how often flatwork employees worked with the wall crew. David Chavez, a flatwork employee whose ballot was challenged by the Union, did not testify at trial. I would note that all the flatwork employees who testified had an additional incentive to testify favorably for Respondent since they were all working during the trial while all the footer and wall crew employees had been laid off.

Franky Pineda and Junior Perez did labor tasks, such as setting forms with the wall/footing crew on about 12-14 occasions during the January-August time period, usually when it rained. I discredit Pineda and Perez's testimony to the contrary (that they worked with wall/footing crew 2-3 days a week). Moreover, I find them generally incredible witnesses.[11]

Flatwork crew leader Robert Rapka helped tear down wall forms on about 4 occasions during the period January–August 2014.[12] I find that Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka should be excluded from the bargaining unit even if the community of interest test is applied to this case. I do so on the basis of the very limited interaction between these employees and those on the wall and footer crews and the fact that the two crews had different supervisors. Moreover, Respondent generally treated the wall and footer crews as distinct entities from the flatwork crew employees.

On the other hand, Brian Wegman, another flatwork crew leader, acted as wall crew foreman when the regular foreman, Jim Andrisko, was on vacation, or was not at work for other reasons. Based on Brian Wegman's classification on the time sheets as a footer and wall employee and the extent of his work with the wall crew, I find that Brian Wegman's ballot should be opened and counted.

The Objections to the Election

After the ballots of Dominic Valenta, Benny Leviner, Derrick Mann and Brian Wegman are opened and counted, if a majority of the ballots are cast in favor of the Union, it should be certified as the exclusive collective bargaining representative of all full-time and part-time wall and footer carpenters employed by the Employer working out of its facility located at 1640 East North Street, Crown Point Indiana. If the majority of the ballots cast are not in favor the Union, the results of the October 3, 2014 election must be set aside and a new election held that properly reflects the will of the employees free from unfair labor practices or other objectionable conduct.

[11] Although, I am not a great believer that a trier of fact can discern anything from a witness' demeanor, I was struck by Perez's discomfort in testifying. I infer that he was testifying to facts about which he knew were at a minimum, exaggerated.

At page 20 of its brief Respondent states that Mitchell Weidinger, in his rebuttal testimony at Tr. 607 confirmed that Pineda worked with the wall and footer crews 2-3 times a week during the period of January-August 2014. It is evident that Tr. 607, line 24 is either mistranscribed or that Weidinger misspoke. Tr. 607 lines 11-21 make that readily apparent.

[12] Respondent at page 24 of its brief cites Benko's testimony regarding Brian Wegman at Tr. 331 incorrectly by stating he was testifying about Robert Rapka. Rapka did not fill in for James Andrisko as wall foreman.

Conclusions of Law

1. Respondent violated Section 8(a)(1) of the Act, and engaged in objectionable conduct in threatening stricter enforcement of its requirement for a CDL license during the critical period between the filing of the representation petition and the election.

2. Respondent violated Section 8(a)(3) and (1) and engaged in objectionable conduct by threatening Robert Carpenter and Mike Keilman with termination for attendance issues during the critical period.

3. Respondent violated Section 8(a)(1) of the Act , and engaged in objectionable conduct in distributing a flyer during the critical period in which it stated that if employees chose union representation, bargaining would begin "from scratch."

4. Respondent violated Section 8(a)(3) and (1), and engaged in objectionable conduct in terminating Dominic Valenta on August 29, 2014.

THE REMEDY

The Respondent, having discriminatorily discharged Dominic Valenta, it must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on his Social Security earnings record.[13]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

Order

The Respondent, Neises Construction Corp., Crown Point, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[13] I decline to order reimbursement for Dominic Valenta's expenses while searching for interim employment, in the absence of a Board Order changing existing law.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against any employee for engaging in union or other protected activity.

(b) Initiating any new rules or policies designed to discourage employees from selecting union representation.

(c) Threatening employees with stricter enforcement of Respondent's rules or policies to discourage them from selecting union representation

(d) Threatening employees with termination for absences or tardiness to discourage them from selecting a union to represent them.

(e) Suggesting to employees that it would be futile to select a union as their collective bargaining representative because Respondent will start bargaining "from scratch."

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Dominic Valenta full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Dominic Valenta whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Dominic Valenta, and within 3 days thereafter notify Dominic Valenta in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful reprimands issued to Robert Carpenter and Mike Keilman and within three days notify them in writing that this has been done and that these reprimands will not be used against them in any way.

(e) Rescind any new rules or policies that were initiated between the filing of the Union's representation petition and the representation election on October 3, 2014.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Crown Point, Indiana facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 29, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 10, 2015

Arthur J. Amchan
Administrative Law Judge

15 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in union or other protected activity.

WE WILL NOT threaten you with stricter enforcement of any rules or policies in order to discourage you from selecting union representation.

WE WILL NOT initiate any new rules or policies in order to discourage you from selecting union representation.

WE WILL NOT convey the impression to you that selecting union representation will be futile by telling you that collective bargaining will begin "from scratch."

WE WILL within 14 days of this Order offer Dominic Valenta full reinstatement to his former job, or if that no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Dominic Valenta whole for any loss of earnings and benefits suffered as a result of his discharge, less any net interim earnings, plus interest.

WE WILL compensate Dominic Valenta for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days of this Order, remove from our files any reference to our unlawful termination of Dominic Valenta and our unlawful reprimands issued to Robert "Doug" Carpenter and Mike Keilman on September 9. 2014. WE WILL, within 3 days thereafter, notify them in

writing that this has been done and that Dominic Valenta's discharge and Robert Carpenter and Mike Keilman's reprimand will not be used against them in any way.

WE WILL rescind any changes to our rules and policies that were initiated during the period between the Union's filing of a representation petition on August 29, 2014 and the October 3, 2014 and WE WILL NOT enforce these rules and policies more strictly than they were being enforced prior to August 29, 2014.

WE WILL if the Union prevails in the final counting of the ballots from the October 3, 2014 election, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and part-time wall and footer carpenters employed by the Employer working out of its facility located at 1640 East North Street, Crown Point Indiana.
>
> Excluded: All other employees, all employees who are currently represented by other labor organizations, managerial employees, professional employees, confidential employees, clerical employees, supervisors, and guards as defined by the Act.

NEISES CONSTRUCTION CORPORATION.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-1443

(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-135991 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.